A

KEMBANG SERANTAU SDN BHD v. JEKS ENGINEERING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 24C(ARB)-28-08-2015]
B 19 NOVEMBER 2015

ARBITRATION: *Award – Setting aside – Time limit – Whether application filed out of time – Whether there was inordinate delay – Change in judgment –Whether court had power to grant extension – Arbitration Act 2005, ss. 8, 37(4)*

C

WORDS & PHRASES: *'may not' – Arbitration Act 2005, s. 37(4) – Scope of - Whether directory or mandatory in nature*

The plaintiff applied *via* encl. 1 to set aside an arbitration award rendered on 30 April 2015 ('the award') under s. 37 of the Arbitration Act 2005
D ('the Act'). The plaintiff conceded that it had received the award on 7 May 2015 and that the last day for filing the application was 5 August 2015. Therefore, the application filed on 6 August 2015 was a day late. The defendant raised the matter of delay at the outset; pointing out that the application to set aside the award was filed out of time. The plaintiff then
E applied for an extension of time (encl. 10). In urging the court to grant the extension, the plaintiff submitted that the one day delay was due to a clerical miscalculation of the 90-day period and that it was a genuine mistake. The plaintiff further claimed that the defendant was not prejudiced by the delay. In opposition, the defendant submitted that the court lacked jurisdiction or
F power to grant the extension that the plaintiff sought; and that there was no basis for the exercise of discretion. The primary issue was whether on a proper reading of s. 37(4), the court had the discretion to extend the prescribed 90 day period.

Held (dismissing application with costs):

G **(1)** The appearance of the words 'may not' in s. 37(4) could not reasonably be read as denoting a merely directory requirement. The use of the term 'may' as opposed to the term 'shall' is frequently, if not most often, understood to connote the difference between the concept of mandatory and directory requirements. But sometimes, as was the case here, the
H sentence construction simply does not permit the use of the word 'shall'; and the word 'may' is then used. This usage does not detract from the basic object or intention of the provision which is to require mandatory or strict compliance. Therefore, s. 37(4) of the Act must be given a strict reading and is intended to be mandatory and complete in application.
I (paras 26 & 29)

(2) The significance of s. 8 of the Act could not be overstated; that the court's intervention is only where it is so provided. The matters that may be referred to arbitration, matters concerning procedure and the conduct of arbitrations, the role of the arbitrators and the involvement of the court are all matters governed by the Act. Where the provisions do not provide for the intervention of the court, the court ought to decline intervention even if the court would treat the matter differently if it was a non-arbitration matter. (para 30)

(3) When dealing with arbitration and arbitration related matters, it is not so much a case of the court's powers being taken away; for that remains intact; but a situation of the court applying specific law of arbitration to the matter. The specific law has enacted on the procedure and principles when dealing with setting aside of arbitral awards. The provision that an application to set aside the award 'may not' be made after the expiry of 90 days from the date on which the party making the application had received the award is as good as saying that where an application is contemplated, it must be made before the 90-day time frame. Anything after that period must not be entertained. (para 34)

(4) The language and explanation offered for the delay was that of solicitor's error, which did not merit an exercise of discretion. Justice is not only to the plaintiff but also to the defendant. Further, the award had already been recognised and registered through an order made under s. 38. That order was not appealed against. It was thus highly irregular for the plaintiff to now apply to set aside the said award under s. 37. The grounds and total circumstances did not warrant the exercise of discretion in the plaintiff's favour. (paras 50-53)

Case(s) referred to:

ABC Co v. XYZ Ltd [2003] SGHC 107 ***(refd)***

AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(refd)***

ASM Shipping Ltd of India v. TTMI Ltd of England (The Amer Energy) [2009] 1 Lloyd's Rep 293 ***(refd)***

Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd [2012] 6 CLJ 156 HC ***(refd)***

Government of India v. Cairn Energy India Pty Ltd [2003] 1 MLJ 348 ***(refd)***

Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd ("TLL"), A Thai Company & Anor [2011] 1 LNS 1903 CA ***(refd)***

Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor [2012] 10 CLJ 399 HC ***(foll)***

Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd [2003] 1 CLJ 429 CA ***(refd)***

JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd [2013] 7 CLJ 249 HC ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Percon Corp Sdn Bhd v. Yap Choon Loy [1998] 3 CLJ 423 CA ***(refd)***

A *The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC* ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***

TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 1 LNS 288 CA ***(refd)***

B

Legislation referred to:

Arbitration Act 1952, s. 31

Arbitration Act 2005, ss. 8, 37(2), (4), (5), 38, 42(1), 50

Companies Act 1965, s. 218

Rules of Court 2012, O. 69

C Rules of the High Court 1980, O. 14A, O. 69, O. 92 r. 4

Arbitration Act 1996 [UK], s. 80

For the plaintiff - Ismail Mohamed Arifin (Muhammad Rafiqree Hamka Ruslan with him); M/s Ram Reza & Muhammad

For the defendant - Choon Hon Leng (Leong Mei-San with him); M/s Raja Darryl & Loh

D

Reported by Suhainah Wahiduddin

JUDGMENT

E **Mary Lim J**

[1] There are two applications before the court: encls. 1 and 10. Enclosure 1 is the plaintiff's application to set aside an arbitration award rendered on 30 April 2015 (the award) under s. 37 of the Arbitration Act 2005 (Act 646).

F **[2]** After some initial hesitation, the plaintiff conceded that it had received the award on 7 May 2015. The last day for filing the application under s. 37 is 5 August 2015. Therefore, the application filed on 6 August 2015, is a day late. On that score, the formal written application found in encl. 10 was then made.

G **[3]** Amongst the reasons given was the mistake of solicitors. Learned counsel for the plaintiff explained that the one day delay in filing was due to his miscalculation of the time period; that it was a genuine mistake for which he apologises; and he urged the court to grant the extension. In opposition, learned counsel for the defendant submitted that the court lacks

H jurisdiction or power to grant the extension that the plaintiff seeks; and that there was no basis for the exercise of discretion.

[4] Upon hearing both counsel, and after due and proper consideration of the papers and the principles at play, I agreed with the defendant and dismissed the application with costs. These are my reasons.

I

The Jurisdictional Issue

[5] Section 37 of the Arbitration Act 2005 (AA 2005) deals with the matter of how a party may set about setting aside an award:

Application for setting aside

37. (1) An award may be set aside by the High Court only if-

(a) the party making the application provides proof that-

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where-

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred-

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) …

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

A (5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

[6] The material provision is sub-s. 37(4). The operation of this provision was considered in three cases: *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* [2012] 6 CLJ 156; [2012] 3 MLJ B 737; *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* [2012] 10 CLJ 399; and *JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd* [2013] 7 CLJ 249. In the first two decisions, the court was of the view that the court had jurisdiction to extend time while the court in the third case disagreed; after having had the opportunity to consider the first C two cases. Discretion was exercised to allow extension in the first of the two cases but not in the second.

[7] The first two decisions went on appeal. Both decisions were overturned by the Court of Appeal. The written grounds of the Court of Appeal's decision in *Government of the Lao People's Democratic Republic v.* D *Thai-Lao Lignite Co Ltd ("TLL"), A Thai Company & Anor* [2011] 1 LNS 1903 is available for assistance. The Court of Appeal agreed with the High Court that there is jurisdiction but disagreed on the exercise of discretion; hence the appeal was allowed. The plaintiff has relied on these decisions where both High Court was of the view that there was jurisdiction to extend time under E s. 37 although both judges departed on their exercise of discretion because of the prevailing facts. The defendant relied on the third case. This court agreed with the defendant.

[8] The primary issue is whether on a proper reading of sub-s. 37(4), the court has discretion to extend the prescribed 90 day period.

F

[9] In the first case of *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd*, the arbitration proceedings arose out of a joint venture shareholder's agreement entered between the parties. The parties wanted to set up a joint venture company for a water-bottling plant project. The project was financed by Malayan Banking Berhad (MBB). G Midway through the arbitration proceedings, the parties recorded first, a consent award on 2 April 2010 and later, on 2 July 2010, a consent order on costs and on payment of certain sums. That consent order on costs was then enforced and recognised on 18 April 2011. Unbeknown to the parties, also midway through the arbitration proceedings but before making the H awards, the arbitrator was appointed as a non-independent non-executive director and a member of the credit review committee of MBB.

[10] The plaintiffs sought to set aside the consent award, consent order on costs; and the enforcement order of the High Court. The application was filed late. On the question of extension of time, the court took the view that the I court had discretion under sub-s. 37(4) to grant time as the word used in sub-s. 37(4) is 'may' and not 'shall'. His Lordship agreed with the plaintiffs that:

> … there is a discernible difference between a preemptory 'shall' and a permissive 'may'. The former is mandatory whereas the latter is not. The former takes away any discretion for extension of time for instance whereas the latter leaves some room for the exercise of discretion to extent time in the context of a time frame to do a particular act. Parliament could have used the word 'shall' if they had wanted to as 'shall' is used in the context of a time frame to make an application in s. 42(2) of the Act as follows …

[11] The court found that it "retains some residue of discretion in extending the time for a party to file an application to set aside an award exceeding 90 days time frame from the date the award is received …" The court reasoned that:

> The wisdom of the Legislature in using the word 'may' in s. 37(4) of the Act is to cater for a myriad of circumstances where the ground for setting aside an award only becomes apparent much later upon the discovery of what under the regime of the Arbitration Act 1952 is a possible misconduct or as in this case, some breaches of the rules of natural justice (s. 37(2)(b)) as in the arbitrator being a Director of MBB that is the financier of the joint venture where the parties to the joint venture share agreement have submitted their claims to arbitration. Such a knowledge was not had earlier until September 2011 and as pointed out by learned counsel for the defendant there was delay of some 480 days.

[12] The court further relied on the decision of *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* where the court had similarly formed the view that sub-s. 37(4) is directory and not mandatory.

[13] In the second case of *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*, the plaintiff had obtained leave to serve the related originating process outside jurisdiction and had indeed served the cause papers on the defendants. The plaintiff's substantive application was to set aside the arbitral award under s. 37 of the Arbitration Act 2005. In the same application, the plaintiff had also sought to extend time since the application was filed some nine months after the date of receipt of the award.

[14] The defendants entered a conditional appearance and proceeded to apply to set aside the service of the originating process - encl. 10.

[15] At the hearing of encl. 10, "for just, expeditious and economical disposal of the case", the court decided to exercise discretion under O. 14A of the Rules of the High Court 1980 to ascertain whether, on the *prima facie* grounds stated by the plaintiff to seek extension of time, the court will be minded to extend time when dealing with s. 37(4) of the AA 2005. The defendants did not participate in the arguments having received instructions "not to participate at this stage of the proceedings". As His Lordship said, this "position of the defendants is understandable as they have only obtained

A conditional appearance and ought not to participate in any arguments relating to the merit of the originating process itself" Thereafter, the court heard submissions only from the plaintiff.

[16] Upon hearing submissions, the court refused to exercise discretion in favor of the plaintiff on grounds of inordinate delay of some nine months and
B because the grounds proffered did not warrant such exercise. The court took "the view that the prayer for extension of time ought not to be condoned by the court on the facts of the instant case". This was what the court said:

> It is trite that the AA 2005 has *prima facie* accepted the UNCITRAL Model
C Law and the judicial sentiment here as well as other countries which have adopted the same is inclined towards the jurisprudence relating to "minimum intervention of the court" in matters governed by the Act. I have dealt with this area of jurisprudence in a number of cases, to name a few are as follows: (a) *Taman Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83 HC, (b) *Chip Lam Seng Berhad v. R1 International*
D *Pte Ltd* [2010] 1 LNS 64 HC, and quite recently in *Sundra Rajoo v .Mohamed Abd Majed & Anor* [2011] 6 CLJ 923 HC. Case No. D-24NCC(Arb)-13 of 2010.
>
> [14] In Singapore and New Zealand, the courts had occasion to consider it art. 34 of the Model Law contemplated an extension of time to set aside the award outside the 90 days time frame. They concluded it did not. On
E this issue I agree with the counsel for the plaintiff that the Malaysian courts are not bound by this decision. However, I must say here the decision of the foreign courts in relation to common provisions or similar provisions as advocated by the Model Law or it's like for good governance of national as well as international issues must be given significant weight
F in a civilised atmosphere notwithstanding the local laws may have provision to condone delay or case laws may have condoned delay.
>
> [15] I agree with the plaintiff's contention that s. 37(4) of the AA 2005 is directory and not mandatory, in a limited sense only. In the instant case there is a nine-month delay and the grounds stated *prima facie* do not warrant the court to condone delay. The delay here is not "just delay"
G but I will say inordinate delay as the plaintiff had adequate legal representation. This is not a case of nominal delay or a situation where a calamity such as tsunami has taken place, for the court to exercise its inherent jurisdiction to condone delay even though limited discretion is vested pursuant to various statute and/or rules of court.

H **[17]** In both cases, it was concluded at the High Court that sub-s. 37(4) is directory in character. Both courts compared the language of s. 37 with that found in s. 42 to draw that principal conclusion; that the intention in sub-s. 37(4) is to be permissive or directory in compliance with the time frame as opposed to the mandatory requirement in sub-s. 42(1). With such
I a reading, the court then could engage its powers under the Courts of Judicature Act 1964 and the then Rules of the High Court 1980 to "enlarge" time.

[18] This permissive or directory reading of sub-s. 37(4) appears to have also found favour with the Court of Appeal. At para. 14 of the decision in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd ("TLL"), A Thai Company & Anor*, the Court of Appeal agreed with the High Court's view that the High Court had jurisdiction to grant an extension of time to set aside an arbitral award, "based on the wording of s. 37(4) of the Arbitration Act 2005". The Court of Appeal then proceeded to say:

> The Court has an unfettered discretion to grant an extension of time. The Court may extend such period of time although the application is only made after the expiration of the said period. This is supported by item 8 of the Schedule to the Courts of Judicature Act 1964 which empowers the Court to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefore is not made until after the expiration of the time prescribed. Order 3 Rule 5(1) and (2) of the Rules of the High Court 1980, also provides for the same power to the Court.

[19] Thereafter, the Court of Appeal discussed the factors or circumstances that the court needs to consider when deciding whether or not to exercise its discretion and grant the extension sought.

[20] From the Court of Appeal's discussion and reliance on cases such as *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [1998] 4 CLJ 883; [1998] 4 MLJ 297; *Percon Corp Sdn Bhd v. Yap Choon Loy* [1998] 3 CLJ 423; [1998] 3 MLJ 867 and *ASM Shipping Ltd of India v. TTMI Ltd of England (The Amer Energy)* [2009] 1 Lloyd's Rep 293; it is obvious that the test or principles which are applied are those generally applied in any civil litigation case that comes before the court. The Court of Appeal further stated that:

> When considering an application for extension of time, the Court has the widest measure of discretion and the Court shall look into all circumstances of the case and must recognise the overriding principle that justice must be done.

[21] With respect, the construction of sub-s. 37(4) depends to a large extent, the approach the courts wish to adopt when dealing with arbitration and arbitration related matters. That construction and interpretation also depends on how the court views the relevance and role of Uncitral Model Law. In the last ten years since its enactment, the courts have acknowledged and recognised that Act 646 takes its roots from the Uncitral Model Law despite the fact that Malaysia has yet to accede to that Convention. The inclusion of particular regimes for domestic arbitrations, that is, Part IV of the Act, which may be adopted or opted in for international arbitrations does not affect the approach taken. The inclusion is a drafting tool of legislating for both domestic and international arbitrations in a single statute as opposed to separate legislations for the two; as is the case with certain jurisdictions such as Singapore and India.

[22] On this question of how the courts are to receive Model Law, the Court of Appeal observed that the High Court had:

> ... relied so much on the UNCITRAL Model Law in coming to his decision that the prayer for extension of time in arbitration matter ought not to be condoned by the Court. He expressed his view that "it is trite that the Arbitration Act 2005 has *prima facie* accepted the UNCITRAL Model Law and the judicial sentiment here as well as other countries which have adopted the same is inclined towards the jurisprudence relating to 'minimum intervention of the Court' in matters governed by the Act".
>
> 31. With respect, we are not in agreement with the learned judge on this point. Our view is that, even though the Malaysian Arbitration Act 2005 had *prima facie* accepted the UNCITRAL Model Law, it does not in any way take away the powers of the Court in dealing with any application for extension of time. There is no express provision to that effect, the Model Law, particularly Article 34(2) thereof, provides for the grounds under which an arbitral award may be set aside by the Court. They relate to the substantive application to set aside the award. There is no mention about an extension of time to file the said application. Even section 37 of the Arbitration Act 2005 does not expressly prohibit the powers of the Court to extend time in appropriate case.

[23] It is observed that the Court of Appeal came to the conclusion that the court retains its powers to extend time because there are no express provisions in Act 646 prohibiting the exercise of the court's powers on the same. It would appear that s. 8 of the Act 646 was not brought to the Court of Appeal's attention. Neither was it raised in the High Court. If it was raised, I am certain that it would have made a material difference. It certainly did in the third case.

[24] The position of s. 8 was discussed in *JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd*. In this decision, the High Court similarly had to consider sub-s. 37(4); whether it was directory or mandatory in intent. Both decisions of *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* and *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* were brought to the court's attention and relied on by the plaintiff to find that the court had discretion to extend time under sub-s. 37(4). The plaintiff in that instant case also submitted that the six day delay was not inordinate delay unlike the delay on the facts in the two cited cases. Aside from these two cases, the plaintiff had also relied on the Courts of Judicature Act and the court's inherent jurisdiction under O. 92 r. 4 of the Rules of the High Court 1980.

[25] The plaintiff's submission was rejected by the court. After examining art. 34(3) of the Model Law which deals with the same, the court opted for a strict reading of sub-s. 37(4) and concluded that it had no jurisdiction to extend time under sub-s. 37(4). These were his reasons:

[15] The "explanatory note" to the Model Law refers to art. 5 and highlights that all instances of possible Court intervention are to be found within the confines of the Model Law. See explanatory note 16. Article 5 reads:

> Article 5. Extent of court intervention
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.

[16] The intent and purpose of art. 5 is captured in our s. 8 of our Arbitration Act. This section previously read:

> 8. Extent of court intervention
>
> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

[17] It has now been amended by the Arbitration (Amendment) Act 2011 to read:

> 8. Extent of court intervention
>
> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[26] His Lordship recognised that the position here is different from the position in England. There is express power under s. 80 of the English Arbitration Act read in conjunction with r. 62.9(1) of the CPR for the application of the rules of court relating to the reckoning of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement. According to His Lordship:

[19] Having considered the submissions and the provisions in our Arbitration Act, I tend to be of the view that on a proper reading of s. 37(4) the time limit imposed is mandatory, this view accords with the generally accepted view that under the Model Law, the time limit is strict and express power must be given under the law itself before the court can extend time. This view also accords with the principle of minimal intervention by the courts of law as strongly underlined in our s. 8 of the Act. Support for this strict reading can be found within the four corners of s. 37 itself. Unlike art. 34 of the Model Law which provides no exceptions, our s. 37(5) provides two exceptions:

> (5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

[20] Thus, expression *unius est exclusion alterius*.

[21] The appearance of the words "may not" in s. 37(4) cannot reasonably be read as denoting a merely directory requirement. In the total scheme of our Arbitration Act and bearing in mind the full provision of s. 37, this will be a case where "may" should be read as "must" or "shall" to

A effectuate the legislative intent. To this extent, I have to say, with due respect to my learned brother judge in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*, I differ in my reading of s. 37(4). I note however that even in that decision the learned judge took a very limited and narrow view of the court's power to extend time in this context. Indeed the High Court dismissed the application for leave B to file the setting aside outside the time limit.

[27] In reaching his decision, Justice Mohamad Ariff Yusof (as His Lordship then was) took note of the persuasive decision in *ABC Co v. XYZ Ltd* [2003] SGHC 107. In that case, the High Court of Singapore similarly had to consider whether there was room for inherent jurisdiction or use of C any of its other powers when dealing with applications for extensions of time. The High Court *inter alia* opined:

> The starting point … must be the Model Law itself. On the aspect of time, art. 34(3) is brief. All that it says is that the application may not be made after the lapse of three months from a specified date. Although the words D used are "may not" these must be interpreted as "cannot" as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art. 34 has been drafter as the all- E encompassing, and only, basis for challenging an award in court. It does not provide for any extension of time period and as the court derives jurisdiction to hear the application from the article alone, the absence of such a provision means the court has not been conferred with the power to extend time (per Judith Prakash J at page 550 of the report).

F **[28]** This was Justice Ariff's conclusion:

> [23] I do not see why the Malaysian approach to the same broad issue should be any different, particularly in light of the express wording of our own statutory provision.

G **[29]** I adopt the strong sound reasoning of Justice Ariff. The use of the term "may" as opposed to the term "shall", is frequently if not most often understood to connote the difference between the concept of mandatory and directory requirements. That is quite understandable as these terms themselves bear that particular persuasion. But, that is merely a start or a point to begin the examination of the meaning and intent behind the relevant H provision of law. Sometimes, as it is the case here, the sentence construction simply does not permit the use of the word "shall"; and the word "may" is then used. This usage does not detract from the basic object or intention of the provision which is to require mandatory or strict compliance. More important is to revert to the jurisprudence referred to in *Government of the Lao* I *People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*, that the court adopts a minimalistic approach when dealing with arbitration and arbitration

related matters. Such an approach does not spell a lack or want of jurisdiction of the court; but rather that the court declines jurisdiction in such matters; giving effect to and enforcing contractual obligations of the parties; the bedrock of the concept of party autonomy.

[30] The significance of s. 8 cannot be overstated; that the court's intervention is only where it is so provided. The matters that may be referred to arbitration, matters concerning procedure and the conduct of arbitrations, the role of the arbitrators and the involvement of the court are all matters governed by the Act. Where the provisions do not provide for the intervention of the court, the court ought to decline intervention even if the court would treat the matter differently if it was a non-arbitration matter. I am aware that this is quite a liberal interpretation of s. 8 but given one of the basic principles of arbitration is party autonomy especially in international commercial arbitration, I am comfortable with that understanding. These matters are recognised as part of the bargain entered into out of the parties' own free will. Parliament has seen fit to treat this lot of cases in a different manner. Absent fraud and the complaints of corruption, I see no reason why such an approach is wrong or that the jurisprudence and approach of other like-minded Model Law jurisdictions are not persuasive.

[31] Subsection 37(5) was also not considered in any of those decisions. Subsection 37(5) is express provision on the non-application of sub-s. 37(4) to applications for setting aside on the ground that the award was induced or affected by fraud or corruption. These two grounds can be found in sub-s. 37(2). The existence of sub-s. 37(5) reinforces the argument that sub-s. 37(4) is intended to be mandatory and complete in application. Otherwise, sub-s. 37(5) would be redundant. If it can be inferred or construed that the court can extend the time prescribed in sub-s. 37(4) regardless the ground relied on for setting aside the application, there would have been no need to again provide in sub-s. 37(5) for cases where the ground relied on is fraud or corruption. Subsection 37(5) would be superfluous.

[32] As Justice Ariff puts it, the time limit in art. 34 of the Model Law "is strict and express power must be given under the law itself before the court can extend time … Unlike art. 34 of the Model Law which provides no exceptions, our s. 37(5) provides two exceptions". In the two exceptions of fraud or corruption, it would be proper to read that the court has power to then extend time.

[33] Within the four corners of sub-s. 37(4) is the express provision that the 90 day period runs from a different date where there is a request to correct the award under s. 35. Where that happens, the period is computed from the "date on which that request had been disposed of by the arbitral tribunal". That does not arise on the present facts.

[34] When dealing with arbitration and arbitration related matters, it is not so much a case of the court's powers being taken away; for that remains intact; but a situation of the court applying specific law of arbitration to the matter. The specific law has enacted on the procedure and principles when dealing with setting aside of arbitral awards. The provision that an application to set aside the award "may not be made after the expiry of 90 days from the date on which the party making the application had received the award" is as good as saying that where an application is contemplated, it must be made before the 90 day time frame. Anything after that period must not be entertained.

[35] This is the prevalent understanding of art. 34 of the Model Law after which s. 37 is drafted. It would not be conducive to commerce, industry or business, be it international or national, were the courts to depart from this approach where legislation has clearly intended otherwise. The amendments to the Arbitration Act in 2011, especially to s. 8 should drive this well and truly home. I believe that at the time of its decision, not only was the Court of Appeal not appraised on s. 8, the amendments to the Act may not have been made or in force. This is reason enough for this court to respectfully depart from the decision of the Court of Appeal.

[36] The significance of s. 8 and the underlying policy considerations in Malaysia's subscription to Model Law has been well-recognised by the appellate court in several decisions. See *The Government of India v. Cairn Energy India Pty Ltd v. & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441, *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395, and *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288; [2013] 4 MLJ 857. Recently, in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617; [2015] 6 MLJ 126, the Court of Appeal said:

> THE UNDERLYING POLICY CONSIDERATIONS
>
> [10] Underlying these detailed legal arguments is the important issue of the extent to which courts should interfere with an arbitration award in the context of the Act which has made it clear in s. 8 (as amended) that no court shall intervene in matters governed by the Act 'except where so provided in [the] Act'. The policy to be adopted by our courts is that of minimal intervention consistent with the policy underlying the UNCITRAL Model Law, which Malaysia has incorporated with suitable amendments. Section 37 mirrors the Model law (Article 34). ...
>
> [11] Suffice for us to refer to our Federal Court Judgment in *Government of India v. Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 and *AJWA for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625*; [2013] 2 CLJ 395 as authorities in point.
>
> [12] ...

[13] In *AJWA for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal*, *supra*, Ramly Ali JCA (now FCJ) stated:

> Section 37(1) of the Arbitration Act 2005 provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court's discretion in setting aside the arbitral award is now limited to the narrowly defined circumstances in line with modern international arbitral practice. The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act 2005 is that the court should be slow in interfering with an arbitral award ...

[37] In fact, the Court of Appeal had also expressed the view that:

> ... The Court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the Arbitration Act 2005 which is for all intent and purpose to promote one-stop adjudication in line with the international practice ...

[38] With the clear express terms of s. 8, I cannot see how the court can read that there are retained powers to extend the time specified in sub-s. 37(4) when clearly there is none; save for the instances of correction of the award under sub-s. 37(4); and where there are allegations of corruption on fraud under sub-s. 37(5). These are express provisions on the application or rather non-application of the provisions on time set out in the earlier part of sub-s. 37(4). Under sub-s. 37(4), time runs from a different point in time where it involves a corrective award; whereas under sub-s. 37(5), the time restrictions do not apply in the case of fraud or corruption. Where there are such express provisions, it is no longer proper to imply any power to extend time for any other reason, ground or circumstance, such as that presented in the instant case; regardless the length of the delay. This reading is consistent with the general approach to arbitration, that it is strict, unless expressly provided otherwise. Such reading lends certainty and confidence to arbitration and is part of the rationale behind the court's support for arbitration.

[39] Another distinguishing factor is the Court of Appeal's reliance on the decision in *Government of India v. Cairn Energy India Pty Ltd* [2003] 1 MLJ 348. That was actually a decision under the old law relating to arbitration, the Arbitration Act of 1952; a regime quite different from that under the new Arbitration Act of 2005. The role of the court and the recourse to court intervention is substantially different. Under s. 31 of the 1952 Act, rules of court may be made to deal with the matters governed by the Act. Hence, the provision of O. 69 of the Rules of the High Court 1980 which deals with arbitration and arbitration related matters.

[40] Under Act 646, there is no equivalent to s. 31. There is only s. 50 which provides for the mode of originating motions when seeking any court intervention. I am conscious of O. 69 of the new Rules of Court 2012; the presence of which does not make any difference to this reading.

[41] Furthermore, there are several decisions concerning this particular arbitration or the various interim awards made that is, *Government of India v. Cairn Energy India Pty Ltd*. By the time of the Court of Appeal's decision in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* the High Court's decision of Faiza Thamby Chik J reported in 2003 had long been resolved. The decision alluded to in the Court of Appeal's decision that was pending in the Federal Court is actually a decision that arose from a decision by Justice Ariff, and not Faiza Thamby Chik J. The Federal Court's decision was delivered shortly after - see *The Government of India v. Cairn Energy India Pty Ltd v. & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441. And, that Federal Court's decision has nothing to do with the present case.

[42] Therefore, I am of the view that sub-s. 37(4) must be given a strict reading. That being so, it is irrelevant the length of delay, be it a day or nine months; the identity of the applicant, a commercial concern or a government; or even the subject matter; so long as the parties have agreed to arbitrate. The only exceptions are within sub-s. 37(4) and sub-s. 37(5); and those exceptions are not presented in this case.

[43] Under such circumstances, the application must be dismissed with costs.

[43] Even if I am wrong, I do not find merit in the present application. Learned counsel for the defendant has urged the court to take cognisance of the related proceedings in KL High Court Civil Suit No: 24C(ARB)-25-06-2015. In that case, the defendant was the applicant seeking an order of the court for recognition of the same award under s. 38 of the Act 2005. That application filed in June 2015 was served on the plaintiff who was the defendant in those proceedings. The plaintiff's solicitors attended the first case management on 23 June 2015 and indicated that a setting aside application was under consideration. After directions on the filing of affidavits were given, the application for recognition and enforcement under s. 38 was set down for hearing on 30 July 2015.

[45] The plaintiff did not file any affidavits. Neither did it file any application to set aside the award. Instead, on the hearing day, the plaintiff sought an adjournment on the basis that it wanted to file an application to set aside the award under s. 37. The plaintiff told the court then that the application had yet to be filed because the plaintiff was still reading the lengthy award. The plaintiff was aware that the time limited for such an application was 90 days from the date of the service of the award.

[46] The defendant opposed the request citing the fact that despite having made similar indications earlier, the plaintiff had done nothing. The adjournment was refused. After finding the conditions under s. 38 was satisfied, the application for recognition and enforcement was allowed with costs. There is no appeal against that decision.

[47] The plaintiff finally filed its application to set aside the award under s. 37 on 6 August 2015. Meanwhile, the defendant proceeded to enforce the award. It initiated winding up proceedings after the plaintiff failed to pay upon a presentation of a notice issued under s. 218 of the Companies Act 1965. The plaintiff then came back to court for a stay of the order granting recognition of the award pending the disposal of its application to set aside under s. 37 - encl. 13 in 24C(ARB)-25-06-2015. Stay was granted pending disposal of the setting aside application in these proceedings.

[48] In the present proceedings to set aside the award, the defendant raised the matter of delay at the outset; pointing out that the application to set aside the award under s. 37 was filed out of time. Although the plaintiff did not think so initially, it later conceded. The plaintiff then applied for an extension of time on 23 September 2015 - encl. 10.

[49] According to the plaintiff, the delay in filing is not deliberate (tidak disengajakan); as from the time the award was rendered, "the plaintiff was awaiting instructions from its client" (pihak plaintif masih menunggu arahan selanjutnya daripada anak guam) - see para. 6. In the subsequent paragraphs, the deponent avers that the delay of one day is actually due to a clerical miscalculation (kesalahan pengkeranian) of the 90 day period; that the delay was not deliberate but an 'honest mistake' of the plaintiff. The plaintiff further claims that the defendant is not prejudiced by the delay.

[50] Here, I observe that the language and explanation offered for the delay is really that of solicitor's error as opposed to client's dereliction or a want of instructions from the client. In the affidavit deposed by one of the solicitors, it is deposed that the plaintiff was awaiting "client's instructions". That surely cannot be right. The real reason for the delay is solicitor's error, as candidly admitted by learned counsel for the plaintiff. I agree with the defendant that that does not merit exercise of discretion - see *Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd* [2003] 1 CLJ 429.

[51] From the Court of Appeal's decision in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*, "all circumstances of the case and … the overriding principle that justice must be done" must be considered. Justice is not only to the plaintiff but to the defendant. It must further be borne in mind that the award has already been recognised and registered through an order made under s. 38. That order was given unopposed by the plaintiff. That order is not appealed.

[52] The plaintiff had itself indicated that it was going to file the application to set aside under s. 37; but it choose to take its own sweet time. The plaintiff may well have raised its objections under s. 39; it did not. It did not oppose the application for recognition and enforcement under s. 38. I believe that having taken that stance, it is highly irregular for the plaintiff to now apply to set aside under s. 37.

[53] I agree with the defendant that the grounds and total circumstances do not warrant the exercise of discretion in the plaintiff's favour. Although the delay is one day, it is still delay. There is the earlier 90 days which have gone past with the plaintiff not having done anything about the award as we can see from the recorded events before the court.

[54] The plaintiff's application in encl. 10 is therefore dismissed. Accordingly, encl. 1 is also dismissed. The court further orders costs of RM5,000.